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No. 00-46

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REASONS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari should be granted because the circuits are divided over whether the federal common-law *D'Oench* doctrine remains valid and that question has substantial continuing significance. Respondent's Brief in Opposition, rather than undermining the basis for granting certiorari, admits virtually *all* of the considerations meriting this Court's review: that there is an irreconcilable circuit conflict; that the conflict is outcome determinative (as demonstrated by this very case); and that the *D'Oench* doctrine is regularly invoked in ongoing litigation.

I. THIS CASE PRESENTS A CONFLICT AMONG SIX CIRCUITS OVER THE VITALITY OF THE *D'OENCH, DUHME* DOCTRINE.

Respondent necessarily admits the clear circuit conflict over the validity of the *D'Oench* doctrine. BIO 2-3. As the Petition explains, the Eleventh Circuit's precedent applying the doctrine in the circumstances of this case is consistent with that of the Fourth Circuit, but has been flatly rejected by the D.C., Third, Eighth, and Ninth Circuits. Pet. 8-9.[1] Not only has the Eleventh Circuit expressly acknowledged and rejected the contrary view of its sister circuits in this and other decisions, Pet. 8, but – demonstrating beyond peradventure that the conflict is outcome determinative and that this case is the perfect vehicle to resolve the issue – the D.C. Circuit previously held *in this case* that the *D'Oench* doctrine is no longer valid, Pet. App. C13. The conflict thus is entrenched and cannot be resolved without this Court's intervention; Respondent does not claim to the contrary.[2]

[1] And while the First Circuit has yet to take sides in the split, the Supreme Court of Massachusetts continues to apply the federal *D'Oench* doctrine in favor of the FDIC and its assignees. *Federal Fin. Co.* v. *Savage*, 730 N.E.2d 853, 858 (Mass. 2000). Because Boston is a major city and financial center, the view of the state courts will control many suits involving assignees, which must be brought in state court if there is no diversity.

[2] Respondent's bizarre claim, BIO 12-13 n. 4, that it was not necessary for the D.C. Circuit to reach the *D'Oench* issue ignores that court's opinion and FIRREA. Noting that 12 U.S.C. § 1821(d)(9) incorporates § 1823(e), and the latter section's supposed requirement that "the agreement forming the basis of a defense or claim concern an identified 'asset acquired by' the FDIC," Respondent claims that *the FDIC* should have prevailed under § 1821(d)(9) because Murphy's claim did *not* involve a specific asset. Respondent is confused. First, the D.C. Circuit addressed and rejected the statutory defense based on both § 1821(d)(9) and § 1823(e), making it necessary for the court to address the FDIC's common-law *D'Oench* defense. Pet. App. C4-7. Second, while Respondent is correct that § 1821(d)(9) incorporates the "asset" requirement of § 1823(e), Respondent has that requirement backwards. That an agreement relate to a specific asset is a prerequisite *for the FDIC to invoke its statutory bar*, not a prerequisite for a private party to raise the agreement against the receivership. Pet. App. C5.

Nor does Respondent even discuss the grave implications that such a conflict has in the area of banking, in which sophisticated parties regularly engage in interstate transactions. Pet. 16-17. The conflict is the purest invitation to forum shopping. The FDIC, which serves as the initial receiver for failed banks, is amenable under 12 U.S.C. § 1821(d)(6)(A) to suit in the D.C. Circuit, which rejects the *D'Oench* doctrine. By contrast, almost all of the banks, successor receivers, and potential private plaintiffs, are located in other jurisdictions, creating a substantial incentive for parties to race to court in a favorable forum.[3] Even once suit has been filed, parties will seek transfer or, in a scenario that might seem implausible had it not occurred in this case, district judges might *sua sponte* transfer matters to other fora that apply the rule they seem to favor.[4]

II. THE QUESTION PRESENTED BY THIS CASE HAS SUBSTANTIAL CONTINUING IMPORTANCE.

Respondent's only real argument against granting certiorari is that the question presented supposedly lacks continuing significance. Respondent relies on a policy statement, fully addressed by the Petition, asserting that the FDIC generally will not invoke the *D'Oench* doctrine as to transactions postdating the enactment of FIRREA. BIO 9-10; Pet. 11-15.

[3] In particular, the two leading banking centers in the southern United States – Atlanta, Georgia, and Charlotte, North Carolina – are located in the Fourth and Eleventh Circuits, both of which hold that the *D'Oench* doctrine retains its vitality.

[4] Respondent's argument that this case "should have been before a district court within the jurisdiction of the Eleventh Circuit in the first instance," BIO 3 n. 1, rings a little hollow: if that were true, it seems likely that the D.C. District Court would have transferred *before* entering the dismissal that was subsequently reversed or that, at the least, the *defendant* would have requested the transfer.

There is, of course, serious doubt that the FDIC consistently follows this policy. Pet. 15 & n. 11.[5] But even if it did, there are to this day numerous cases arising from pre-FIRREA transactions. *See* Pet. 13-15; *see also FDIC* v. *Kooyomjian*, 220 F.3d 10, 12-13 (CA1 2000) (FDIC invoking both *D'Oench* and § 1823(e) as to 1987 facts); *Federal Fin. Co.* v. *Savage*, 730 N.E.2d 853, 855 (Mass. 2000) (successor to FDIC successfully invoking *D'Oench* as to alleged 1985 modification of 1984 loan guarantee).

The many current and inevitable future cases involving pre-1989 facts are not surprising given the long statute of limitations for such cases and given that claims involving long-term banking contracts such as mortgages or loan guarantees may not arise for *decades*. *Cf. Savage*, 730 N.E.2d at 855 (2000 case involving 1984 guaranty that "covered all present and future indebtedness to the bank on the part of [the borrower] and provided that the terms of the guaranty would

[5] Respondent claims, BIO 10 n. 2, that *In Re Boone (Boone v. FDIC)*, 235 B.R. 828 (D.S.C. Bankr. 1998), is "no indicium of the FDIC's" behavior because the court treated *D'Oench* and the statute as co-extensive and ultimately rejected the FDIC's position. A candid description of that case, however, would have added that the FDIC seems to have asserted *only* the common-law doctrine as the basis of its objection. 235 B.R. at 835 ("During the trial, the FDIC objected to the introduction of the August 4, 1993 letter from the FDIC and any testimony from Ms. Boone about the balance of the debt based upon the *D'Oench Duhme* doctrine."). The court's passing *dictum* that the common law had "in essence has been codified" by FIRREA, *id.*, is hardly relevant given that the court rejected the far broader *D'Oench* doctrine on the merits. And what remains significant is the FDIC's behavior – which was to assert the *D'Oench* doctrine in disregard of its supposed "policy." As for Respondent's citation to *Point Developers, Inc.* v. *FDIC*, 961 F. Supp. 449, 458 (E.D.N.Y. 1997), this single example of the FDIC following its claimed policy hardly overcomes the many other cases where it ignored that toothless policy. *See, e.g.*, Pet. 15 n. 11; *cf. FDIC* v. *Kooyomjian*, 220 F.3d 10, 13, 15 (CA1 2000) (FDIC invoking, as to pre-FIRREA facts, both *D'Oench* and § 1823(e) – the latter in violation of its policy statement – and succeeding on the purportedly inapplicable § 1823(e)).

remain in effect unless terminated in writing"). With cases from the early 1980s still winding through the system, this Court can expect an absolute *minimum* of five more years of cases unaffected by the FDIC's policy statement.

But even more fundamentally, Respondent concedes that the *D'Oench* issue will continue to arise indefinitely even as to post-1989 facts because, "[t]o be sure, successors, transferees, and assignees of the FDIC (and its predecessors) have been permitted to invoke the *D'Oench* doctrine in the FDIC's stead." BIO 11 (collecting cases from several circuits). The FDIC's policy simply does not apply to those private parties and has absolutely no bearing on the continuing significance of cases such as presented in the current Petition.

Ignoring the raft of cases from the past two years alone cited in the Petition, Pet. 13, Respondent simply asserts that the class of cases involving successors-in-interest is "minuscule, if not virtually non-existent." BIO 14. We assume that if Respondent had *any* support *at all* for that assertion – on which his entire opposition turns – he would have offered it. But Respondent's claim is made from whole cloth and is demonstrably wrong. This case is the perfect example: the FDIC was the initial receiver, but Respondent now stands in its shoes, having paid no regard at all to the FDIC's policy. The indistinguishable cases cited in the Petition, as well as the additional cases cited by Respondent himself, BIO 11, demonstrate that the current case is hardly alone in its class. That such cases are common is not surprising: the FDIC routinely sells the assets (sometimes combined with certain liabilities) of failed banks or appoints a private substitute receiver if a bank regains its financial footing. Private parties thus will continue to invoke *D'Oench* in cases arising *indefinitely* into the future, in addition to the great many cases now pending that are the legacy of the savings and loan debacle.[6]

[6] The many cases cited in the Petition were not remotely a complete compendium of the cases involving successors and assigns. Many more exist,

The fact that private parties can and regularly do invoke the *D'Oench* doctrine is a principal reason why Respondent is wrong when it relies upon the denial of certiorari in *Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (CA11 1997) (*en banc*), *cert. denied sub nom. Hess* v. *FDIC*, 523 U.S. 1093 (1998). The respondent in that case was the FDIC, not a private successor receiver, and the FDIC explained in its brief in opposition that *it* would no longer invoke the *D'Oench* doctrine. *See* Pet. at 11-12. And while in retrospect the FDIC's claim now seems questionable, at the time there was at least some question about the issue's continuing significance in those cases *as to the FDIC*. Aside from cases involving the FDIC, this Court appears not to have considered that private successors could or would invoke the *D'Oench* doctrine, as the Solicitor General did not bring that fact to the Court's attention.[7] It thus is not surprising that the Court denied certiorari at that time given the lack of any indication that its decision would have substantial continuing significance.

More fundamentally, Respondent's suggestion that the denial of certiorari in a prior case somehow precludes or counsels against review in a subsequent case is mistaken. The Court regularly denies certiorari when there is a realistic prospect that a circuit conflict will resolve itself, particularly as a result of recent Supreme Court decisions. As the Petition

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and they continue to arise. *See, e.g.*, *Savage*, 730 N.E.2d at 855 (successor-in-interest to FDIC invoking *D'Oench*). Furthermore, the reported cases involving *D'Oench* are just the tip of the iceberg. Most controversies settle, either before trial or otherwise without a published opinion. In circuits where *D'Oench* is still applied, settlements will reflect the legal landscape, causing numerous controversies and millions of dollars to be affected without ever generating court opinions.

[7] If our understanding of the context and briefing of the prior petition were incorrect, we fully expect that the Solicitor General, who was served with a copy of the Petition, would have filed a brief in this case on behalf of the FDIC, which was the original defendant in the D.C. District and the appellant in the D.C. Circuit. Pet. at 12 n. 8.

explained and Respondent does not dispute, that was the case with respect to the denial of certiorari in *Motorcity II*, which followed on the heels of this Court's decision in *Atherton* v. *FDIC*, 519 U.S. 213 (1997). Pet. 11-12. When, as here, there no longer is any prospect that the conflict can otherwise be resolved, the Court grants certiorari. *E.g.*, *Central Green Co.* v. *United States*, No. 99-859, *cert. granted* -- U.S. --, 120 S. Ct. 1416 (2000) (certiorari granted despite several recent denials on scope of immunity under Flood Control Act of 1928); *Balar* v. *United States*, No. 98-1667, *cert. granted* -- U.S. --, 120 S. Ct. 10 (1999) (certiorari granted despite recent denial on effect of tax statute of limitations).

Furthermore, Respondent's concession that the *D'Oench* doctrine is disparately invoked by private parties and the FDIC substantially *buttresses* the urgent need for review in this case. This Court grants certiorari to resolve circuit conflicts because federal law should be uniform and should not produce varying results. Not only is there such a conflict here, but under the current state of the law, there can be different results in the *same* circuit and even in the *same* case depending on whether and when a private successor-in-interest is substituted for the FDIC. Here, for example, Respondent's position suggests that if he had not been named as successor, the FDIC would *not* have asserted the *D'Oench* doctrine as to those agreements made post-FIRREA and that the result in the Eleventh Circuit would have been different. The irony of that point is particularly bitter, given that the doctrine was *not* intended to benefit private successors such as Respondent but instead, as the BIO itself explains, "was intended *to protect the FDIC 'and the public funds which it administers* against misrepresentations as to the securities or other assets in the portfolios of the banks.'" BIO 4 (quoting *D'Oench*, 315 U.S. at 457) (emphasis added).

Respondent's only remaining argument – that this Court should await the development of an as-yet-non-existent circuit conflict over whether successors may invoke the

D'Oench doctrine – makes no sense. Although Respondent's argument is correct insofar as it implies that private successors ought not be able to invoke *D'Oench* in any event, the lower courts have yet to take up that view, much less split over the issue. Indeed, Respondent does not cite a single case holding that a successor may not invoke the otherwise-available *D'Oench* doctrine. Furthermore, even accepting that courts *ought* to deny successors the benefit of the *D'Oench* doctrine, and hence that Respondent should have lost this case for more than one reason, such further defect in Respondent's defense is hardly a basis for this Court to deny review. If this Court waited for non-existent future splits to moot existing and entrenched splits, federal law would be confused indeed.[8] Not surprisingly, the existence of a present split has long been one of the primary reasons this Court grants certiorari, notwithstanding mere speculation as to future legal developments.

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *O'MELVENY* AND *ATHERTON*.

Respondent is wrong to assert that certiorari should be denied because the judgment below supposedly is correct. Quoting the Eleventh Circuit, Respondent maintains that *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* do not "'address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine.'" BIO 8. That is simply not true, as Petitioner has already explained, Pet. at 10, and Respondent chooses to ignore. *Atherton* expressly found that a con-

[8] The suggestion to wait for other courts to reject a successor's right to invoke *D'Oench* – and presumably thus moot the existing split – is especially disingenuous given that Respondent has taken precisely the opposite position and claimed entitlement to the *D'Oench* doctrine notwithstanding that it is a mere successor.

gressional enactment had abrogated "a pre-existing judge-made federal common-law standard." 519 U.S. at 225, *quoted in* Pet. 10. And both *Atherton* and *O'Melveny* relied upon the Court's earlier decision in *Milwaukee* v. *Illinois*, which held that "when Congress addresses a question *previously governed by a decision rested on federal common law* the need for such an unusual exercise of law-making by federal courts disappears. . . . [The Court's] commitment to the separation of powers is too fundamental to continue to rely on federal common law . . . when Congress has addressed the problem." 451 U.S. 304, 314-15 (1981) (emphasis added), *quoted in* Pet. 10-11 n. 6.

But Respondent is correct in one important respect: the Eleventh Circuit (joined by the Fourth) holds that this Court's leading modern decisions on the scope of federal common law – *O'Melveny* and *Atherton* – are inapposite to congressional enactments said to supplant pre-existing common law rules. The D.C. Circuit (joined by the Third, Eighth, and Ninth Circuits) holds squarely to the contrary. That fundamental disagreement on the scope of federal common law – premised on a perceived inconsistency between *United States* v. *Texas*, 507 U.S. 529 (1993), and *Milwaukee* v. *Illinois* – itself presents a circuit conflict that, because it encompasses *all* federal common-law doctrines, is of indisputable continuing significance and therefore buttresses the case for granting certiorari.

CONCLUSION

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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